IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-311

THE STATE OF ILLINOIS, *Petitioner,*

vs.

ERNEST GARLICK, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

The People of the State of Illinois respectfully petition this Court for a Writ of Certiorari to review the judgment of the Appellate Court of Illinois, Fifth Judicial District, reversing defendant's conviction for the offense of murder and remanding the case for a new trial.

OPINION BELOW

The opinion of the Appellate Court of Illinois, Fifth District, is reported at 46 Ill. App. 3d 216, 4 Ill. Dec. 746, 360 N.E. 2d 1121 (1977), and is included herein as Appendix A.

The order of the Illinois Supreme Court denying the People's petition for leave to appeal was entered May 26, 1977. This order was not reported. A copy of the letter of notification is included herein as Appendix B.

JURISDICTION

The judgment of the Appellate Court was entered February 17, 1977. A timely petition for leave to appeal was denied by the Illinois Supreme Court May 26, 1977. This petition is timely under Rule 22, where it is filed within 90 days of the final order of the Illinois Supreme Court denying leave to appeal.

This Court has jurisdiction under 28 U.S.C. § 1257(3), where the validity of a State statute was held to be repugnant to the Constitution of the United States.

QUESTION PRESENTED

Whether it is a denial of due process of law under the Fourteenth Amendment to the United States Constitution to place upon a defendant who raises the issue the burden of proving his lack of fitness to stand trial.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION
Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

ILLINOIS REVISED STATUTES

Chapter 38

§ 1005-2-1. *Fitness for Trial or Sentencing.* (a) For the purposes of this Section a defendant is unfit to stand trial or be sentenced if, because of a mental or physical condition, he is unable: (1) to understand the nature and purpose of the proceedings against him; or (2) to assist in his defense.

* * *

(i) The burden of proving the defendant is not fit is on the defendant if he raises the question and on the State if the State or the court raises the question. Ill. Rev. Stat. 1975, ch. 38, § 1005-2-1, vol. 1, pp. 2050-1. (The complete text of this statute is included in Appendix C.)

STATEMENT OF THE CASE

The defendant was indicted on February 17, 1970, for the February 6, 1970 shotgun murder of his wife. After a hearing held July 21, 1970, the court found defendant incompetent to stand trial, and committed him to the custody of the Department of Mental Health. Following a second competency hearing on May 20, 1974, the court found defendant fit to stand trial.

The cause proceeded to trial June 25, 1974. During the presentation of evidence on behalf of the defendant, defense counsel moved for another hearing to determine whether defendant was fit to stand trial. The court granted the motion, and a hearing was held, at which both parties presented evidence. Prior to announcing its decision, the court declared that, under the applicable statute, the party filing the motion had the burden of proving defendant's lack of fitness. Finding that the expert opinion testimony was evenly divided, the court ruled that defendant's motion had not been sustained, and held that defendant was fit to stand trial.

The following day, the trial resumed and defendant took the stand in his own behalf. The jury found defendant guilty of murder, and he was sentenced to a term of from 25 to 40 years in the penitentiary.

MANNER OF RAISING THE FEDERAL CONSTITUTIONAL QUESTION

The defendant raised the issue of the constitutionality of the Illinois statute governing fitness for trial for the first time in his appeal to the Appellate Court. In his brief, defendant contended that he had been denied due process of law by the provision of the fitness statute which imposed upon him the burden of proving his lack of fitness, where he raised the question.

In their brief, the People replied that the defendant had waived the question of the constitutionality of the statute by failing to raise the issue in the trial court. The People further responded that the allocation of the burden of proof to the defendant did not deprive him of due process of law.

The Appellate Court ruled that it was inherently unconstitutional, as a violation of due process, to place the burden of proof on the defendant in a hearing to determine his fitness to stand trial. *People* v. *Garlick,* 46 Ill. App. 3d 216, 4 Ill. Dec. 746, 751, 360 N.E. 2d 1121, 1126. The court declared that Section 1005-2-1 was null and void insofar as it failed to comport with this constitutional prohibition. *Id.* The court, accordingly, reversed defendant's judgment of conviction and remanded the case for a new trial.

The People's petition to the Illinois Supreme Court for leave to appeal was denied.

REASON FOR ALLOWANCE OF WRIT

REQUIRING DEFENDANT'S COUNSEL TO PROVE HIS ALLEGATION THAT DEFENDANT WAS UNFIT TO STAND TRIAL DID NOT VIOLATE DEFENDANT'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW, AS PREVIOUSLY CONSTRUED BY THIS COURT AND THE HIGH COURTS OF SEVERAL STATES.

Review of this case by the Supreme Court is warranted where the Illinois Appellate Court interpreted the Due Process Clause of the Fourteenth Amendment in a manner inconsistent with applicable decisions of this Court, and where the basis of its interpretation was clearly erroneous. At the outset, the People wish to point out that the Illinois Supreme Court did not review this case ostensibly because it reached the same result in another case shortly after the decision herein, and prior to denial of the People's petition for leave to appeal in this cause. See *People* v. *McCullum,* 66 Ill. 2d 306, 5 Ill. Dec. 836, 840, 362 N.E. 2d 307, 310 (1977), included herein as Appendix D.

In deciding the instant case, the Illinois Appellate Court applied the Due Process Clause of the Fourteenth Amendment in a manner inconsistent with its application by this Court in its decisions in *Leland* v. *State of Oregon,* 343 U.S. 790, 72 S. Ct. 1002 (1952), and *Patterson* v. *State of New York,* ——U.S.——, 97 S. Ct. 2319 (No. 75-1861, June 17, 1977). A discussion of these cases follows:

In *Patterson,* defendant appealed his second-degree murder conviction on the ground that he was denied due process of law by a New York statute requiring him to

prove, by a preponderance of the evidence, the affirmative defense of extreme emotional disturbance. The New York Court of Appeals upheld the constitutionality of the statute, and defendant appealed to this Court.

Beginning its consideration of the issue by tracing the history of the law pertaining to the allocation of the burden of proof (*Patterson,* 97 S. Ct. 2323), the Court observed that at common law the burden of proving an affirmative defense rested on the defendant. The Court noted that this was the rule when the Fifth Amendment was adopted, and that this was the American rule when the Fourteenth Amendment was ratified. The Court pointed out that in 1895 the common law view was abandoned with respect to the insanity defense in federal prosecutions in the case of *Davis* v. *United States,* 160 U.S. 469 (1895). The Court commented that *Davis* was not a constitutional ruling, and that this was made clear in *Leland* v. *State of Oregon,* 343 U.S. 790, 798, 72 S. Ct. 1002 (1952). *Id.*

The Court noted that in *Leland* it upheld the constitutionality, under the Due Process Clause, of an Oregon statute which provided that the defense of insanity must be proved beyond a reasonable doubt. *Patterson,* 97 S. Ct. 2324. In refusing to strike down the Oregon law, the Court observed that the burden of proving all elements of the crime beyond a reasonable doubt, including the elements of premeditation and deliberation, was placed on the State under Oregon procedures, and remained there throughout the trial. *Id.*

The Court commented that in 1970, in the case of *In re Winship,* 397 U.S. 358, 364 (1970), it declared that the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of

every fact necessary to constitute the crime with which he is charged." *Patterson,* 97 S. Ct. 2324. The Court noted that five years later, in *Mullaney* v. *Wilbur,* 421 U.S. 684 (1975), it further announced that under the Maine law of homicide, the burden could not constitutionally be placed on the defendant of proving by a preponderance of the evidence that the killing had occurred in the heat of passion on sudden provocation. *Id.* The Court pointed out that it subsequently confirmed that it remained constitutional to burden the defendant with proving his insanity when it dismissed, as not raising a substantial federal question, the case of *Rivera* v. *Delaware,* ——U.S.——, 97 S. Ct. 226 (1976), in which case the appellant specifically challenged the continuing validity of *Leland* v. *Oregon. Id.*

In upholding the validity of the allocation of the burden of proof under the New York statute, the *Patterson* Court declared:

> Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here. *Patterson,* 97 S. Ct. 2327.

The application of this Court's construction, in the *Leland* and *Patterson* cases, of the Fourteenth Amendment Due Process Clause compels the conclusion that requiring a defendant, who raises the issue, to prove his unfitness for trial is not a violation of due process. Under this Court's holding in *Patterson,* the imposition of the burden of proof on the defendant constitutes a denial of due process only if the defendant is thereby required to disprove an element of the State's case against him. To require a defendant to prove his lack of fitness to stand

trial is not tantamount to requiring him to disprove an element of the State's case. Consequently, such a requirement does not deny a defendant due process of law. Indeed, it is no more offensive to the Fourteenth Amendment to place the burden of proof upon the defendant at a fitness determination than at any other ancillary proceeding, such as pre-trial suppression hearing.

The contrary application of the Fourteenth Amendment by the Illinois Appellate Court in the case at bar — and by the Illinois Supreme Court in *McCullum* — was based solely upon the proposition that it is necessarily a denial of due process to require an incompetent defendant to prove his lack of competence. *Garlick,* 4 Ill. Dec. at 751, 360 N.E. 2d at 1126; *McCullum,* 5 Ill. Dec. at 839, 362 N.E. 2d at 310. This proposition must fail the test of law and logic for three reasons. First, as Justice Jones clearly demonstrated in his dissenting opinion in the Appellate Court below, it conflicts with the underlying premise of the *Leland* decision, since it is no more a denial of due process to require an allegedly incompetent defendant to prove his incompetence than it is to require an allegedly insane defendant to prove his insanity. In the second place, it rests on the false premise that a defendant must represent himself at a competency hearing. In the third place, it ignores the nature of the competency determination itself, a discussion of which follows:

Under the Illinois fitness statute, a defendant is unfit to stand trial if, because of a mental or physical condition, he is unable to assist in his defense or to understand the nature and the purpose of the proceedings against him. Ill. Rev. Stat. 1975, ch. 38, § 1005-2-1(a). This statute establishes a number of criteria for measuring a defendant's

fitness. Ill. Rev. Stat. 1975, ch. 38, § 1005-2-1(e). It provides for the appointment of qualified experts to examine defendant and testify regarding his fitness. Ill. Rev. Stat. 1975, ch. 38, § 1005-2-1(g).

Thus clearly, under the Illinois procedure, defendant's counsel is in a position to establish defendant's lack of fitness in the absence of defendant's ability to assist or cooperate with counsel. Indeed, if defendant's assistance were necessary, counsel would never be able to raise the issue of defendant's fitness in the first place. It is the nature of a fitness determination that a defendant is not a participant therein, but the subject thereof. A defendant's unfitness is not an event to which the defendant was a witness, but rather a status which is independently discernible. Consequently, the ability of the defendant himself to prove his incompetence is not only unnecessary, but irrelevant to a competency determination. Accordingly, a defendant is not denied his Fourteenth Amendment right to due process of law by the requirement that defense counsel prove his allegation that defendant is unfit to stand trial.

While the State of Illinois is free to establish, as a matter of its own judge-made law, greater protection for an accused than required by federal constitutional standards, it may not impose a particular protection as a matter of federal constitutional law when the Supreme Court has specifically ruled that such a protection is not required. *Oregon* v. *Hass,* 420 U.S. 714, 95 S. Ct. 1215, 1219, 43 L. Ed. 2d 570 (1975). The reliance of the Illinois Appellate Court, at the outset of its consideration of the issue, upon a United States Supreme Court case involving the application of the Fourteenth Amendment Due Process Clause to an Illinois State court decision (*Pate* v. *Robinson,* 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966)) compels the conclusion that the Appellate Court's subsequent references to due process of law were addressed to the right of the defendant secured by the Fourteenth Amendment to the Constitution of the United States. Accordingly, in light of the *Leland* and *Patterson* cases, the courts of the State of Illinois were not free to hold, as a matter of federal constitutional law, that the defense may not be required to bear the burden of proof of defendant's lack of fitness to stand trial.

The consequences of the resolution of this issue reach beyond its applicability to Illinois cases. At least four other states have cast the burden of proof of competency to stand trial upon the defendant: Colorado (*Gomez* v. *Dist. Court in and for the County of Adams,* 179 Colo. 299, 500 P. 2d 134 (1972); Louisiana (*State* v. *Bastida,* 310 So. 2d 629 (1975)); New Mexico (*State* v. *Armstrong,* 82 N.M. 358, 482 P. 2d 61 (1971)); and Pennsylvania (*Commonwealth* v. *Davis,* 459 Pa. 575, 330 A. 2d 847 (1975)). See dissenting Opinion of Justice Jones in the Appellate Court below, Appendix A, pp. A——.

In sum, the basis of the Appellate Court's holding, that it is a violation of the Due Process Clause of the Fourteenth Amendment to require defense counsel to prove his allegation that defendant is unfit, was clearly erroneous. Where the Appellate Court's holding conflicts with applicable decisions of this Court, it should not be permitted to stand.

CONCLUSION

WHEREFORE, the People of the State of Illinois respectfully request that this Court issue a Writ of Certiorari to review the judgment of the Appellate Court of Illinois.

Respectfully submitted,

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APPENDIX A

FOUR ILLINOIS DECISIONS

360 N.E. 2d 1121

46 Ill. App. 3d 216
360 N.E. 2d 1121

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
vs.
ERNEST GARLICK, Defendant-Appellant.

No. 74-370.

Appellate Court of Illinois, Fifth District.

February 17, 1977.

Defendant was convicted in the Circuit Court, White County, Henry Lewis, J., of the murder of his wife. Defendant appealed. The Appellate Court, George J. Moran, J., held that it is inherently unconstitutional to place the burden of proof on defendant in a hearing to determine his fitness to stand trial, and to the extent that a statute fails to comport with such constitutional prohibition, it is null and void. Where defendant's entire defense concerned his insanity at the time of the crime and his theory was that he had demonstrated marked irrational behavior before the date of crime, it was error to exclude defendant's out-of-court statements which were not offered to prove truth of any facts asserted therein, but were important to the defense based on insanity; such statements were not

hearsay, and the ruling was extremely prejudicial. Use of a colored photograph of the wife's massive head wound was unnecessarily prejudicial.

Reversed and remanded.

Jones, J., dissented and filed opinion.

1. Mental Health – 432

State procedures must be adequate to protect constitutional right of defendant not to be tried and convicted while he is incompetent. Ill. Rev. Stat. 1963, ch. 38, §§ 104-1, 104-2, 104-2(c); S.H.A. ch. 38, §§ 1005-2-1, 1005-2-1(i, j).

2. Criminal Law – 625

It is inherently unconstitutional to place burden of proof on defendant in hearing to determine his fitness to stand trial, and to extent that statute fails to comport with such constitutional prohibition, it is null and void. Ill. Rev. Stat. 1963, ch. 38, §§ 104-1, 104-2, 104-2(c); S.H.A. ch. 38, §§ 1005-2-1, 1005-2-1(i, j).

3. Criminal Law – 412(3), 1169.12

Where defendant's entire defense concerned his insanity at time of crime and his theory was that he had demonstrated marked irrational behavior before date of crime, it was error to exclude defendant's out-of-court statements which were not offered to prove truth of any facts asserted therein but were important to defense based on insanity; such statements were not hearsay, and ruling was extremely prejudicial. Ill. Rev. Stat. 1963, ch. 38, §§ 104-1, 104-2, 104-2(c); S.H.A. ch. 38, §§ 1005-2-1, 1005-2-1(i, j).

4. Criminal Law – 438(7)

Where, in homicide prosecution, there was no reason to graphically supplement medical testimony regarding nature and extent of head wound, nor was there any issue of

cause of death or of identity of victim, so that use of colored photograph of decedent's massive head wound could serve no purpose except to inflame and prejudice jury in the grossest manner, use of photograph was erroneous and prejudicial.

Stephen P. Hurley, Deputy State App. Defender, Fifth Judicial Dist., Herbert Jung, Senior Law Student, Mount Vernon, for defendant-appellant.

Thomas H. Sutton, State's Atty., Carmi, for plaintiff-appellee; Bruce D. Irish, Principal Atty., Raymond F. Buckley, Jr., Staff Atty., Ill. State's Attys. Assn., Statewide App. Assistance Service, Mount Vernon, of counsel.

GEORGE J. MORAN, Justice:

On February 17, 1970, defendant, Ernest Garlick, was charged by indictment with the murder of his wife, Rosalinda Garlick. On July 21, 1970, a hearing was held to determine the defendant's competency to stand trial. The court found defendant incompetent to stand trial and committed him to the custody of the Department of Mental Health. Pursuant to a motion by the State, a second competency hearing was held on May 20, 1974, at which the court found defendant competent to stand trial. At the trial which was thereafter commenced before a jury on June 25, 1974, defendant was found guilty. He was later sentenced to a term of imprisonment of 25 to 40 years.

The essential facts giving rise to this case are not in dispute. On February 6, 1970, at approximately 6:00 p.m., the defendant received a telephone call from his estranged wife, Rosalinda Garlick. After their conversation the defendant became extremely agitated and began pacing back

and forth in the dining room and kitchen of his mother's house. He then went outside and drove off in his car. Between 8:00 and 8:30 p.m. that same evening, a shotgun was fired from the front porch into the home of Lindley and Melba Lamp, the parents of the defendant's wife. Rosalinda was living with her parents at that time and had been watching television in the living room when the gun went off. The deer slug fired from the shotgun passed through a glass storm door and a glass portion of the closed front door before striking Rosalinda in the forehead. Rosalinda died about two hours later.

Investigating officers recovered a slipper embedded in the mud approximately 72 feet to the northeast of the Lamp home and followed the tracks about ¼ of a mile to a road where a car had been parked. The police found a 16-gauge semi-automatic shotgun near a ditch farther up this road. This shotgun, later determined to be the one used in the shooting, belonged to the defendant's eldest brother.

At about 9:30 p.m., the defendant walked into the basement of the Hamilton County Courthouse in McLeansboro, which is about 20 miles from the Lamp home. The courthouse basement was the home of then Deputy Sheriff Coy Braden and his family. Mr. Braden's wife, Monette, was home when the defendant entered without knocking. The defendant's clothes were muddy and he was wearing only one slipper. He said that he was looking for the sheriff, that he needed help, and that he "had just blew [his] old lady's head off." After being summoned to the Braden residence, Sheriff Mobley of White County immediately brought over the slipper that had been found on the front lawn of the Lamp home. The two slippers matched. In addition, Sheriff Mobley found six 16-gauge shotgun shells with deerslug loads in the possession of the defendant.

While defendant has made numerous assignments of error, our disposition of this case makes it necessary to consider only those questions concerning the defendant's competency to stand trial and other matters which could possibly arise on a subsequent re-trial of this case.

After a significant portion of defendant's trial had been completed, defendant moved for and was granted a third hearing to determine his fitness to stand trial. After hearing the evidence on this motion, the trial court, sitting without a jury, found that defendant had failed to prove that he was unfit to stand trial:

> "The party who filed the Petition has the burden of proving this by the preponderance of the evidence. As counsel has said, there has been one psychiatrist who has said that he is able to assist in his defense; the other psychiatrist says no. One psychologist says yes; the other says no. * * * The court has heard all this evidence and believes that the motion has not been sustained; that the defendant is fit to stand trial under the statute and will make an order so finding * * *."

The next day the trial was resumed before the jury.

The provisions which govern a hearing to determine a person's fitness to stand trial are set forth in section 5-2-1 of the Unified Code of Corrections (Ill. Rev. Stat. 1975, ch. 38, par. 1005-2-1). Subsections (i) and (j) of section 5-2-1 provide:

> "(i) The burden of proving the defendant is not fit is on the defendant if he raises the question and on the State if the State or the court raises the question.
>
> (j) The party raising the question has the burden of going forward with the evidence. If the court raises the question, the State shall have the burden of going forward with the evidence. At a fitness hearing held at the instance of the court, the court may call and examine witnesses on the question of fitness."

As noted in the Council Commentary (S.H.A., ch. 38, § 1005-2-1), section 5-2-1 of the Unified Code of Corrections (effective Jan. 1, 1973), replaces comparable sections of the 1963 Code of Criminal Procedure (Ill. Rev. Stat. 1963, ch. 38, pars. 104-1 and 104-2). Under the former law there was an express provision regarding the burden of going forward with the evidence (Ill. Rev. Stat. 1963, ch. 38, par. 104-2(c)), but no express provision with respect to the burden of proof. The Council Commentary of section 5-2-1 of the present Code of Corrections (S.H.A. ch. 38, § 1005-2-1) explains the change by stating:

> "Subparagraphs (i) and (j) merely clarify former law by making explicit that the burden of proof (as well as the burden of going forward) rests with the party requesting a determination of the issue of fitness, and that where the court requests it, the burden falls upon the State."

Both the defendant and the State have stated in their briefs that the above-quoted commentary is in error because the courts of this State have consistently interpreted the former sections (Ill. Rev. Stat. 1963, ch. 38, pars. 104-1 and 104-2) as placing the burden of proof on the State in all cases, thus making the present statutory provision not a clarification, but rather a significant change in the law. Defendant argues that a series of cases establish that placing the burden of proof in a competency hearing upon a criminal defendant is a violation of the defendant's right to due process of law and that the present statute, having shifted to the defendant, the burden of proof in cases where defendant requests a hearing, violates this constitutional right.

[1, 2] State procedures must be adequate to protect the constitutional right of a defendant not to be tried and convicted while he is incompetent. (*Pate* v. *Robinson,* 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). Numerous Illinois cases interpreting the former law have found the burden of proof in a hearing to determine fitness to stand trial to be on the State, irrespective of the origin of the request for the hearing. (*See People* v. *Bender,* 20 Ill. 2d 45, 169 N.E. 2d 328; *People* v. *McKinstray,* 30 Ill. 2d 611, 198 N.E. 2d 829; *People* v. *Bedford,* 31 Ill. 2d 227, 201 N.E. 2d 420; *People* v. *Thompson,* 36 Ill. 2d 332, 223 N.E. 2d 97; *People* v. *Yonder,* 44 Ill. 2d 376, 256 N.E. 2d 321, cert. den., 397 U.S. 975, 90 S. Ct. 1094, 25 L. Ed. 2d 270). These authorities make it clear that the Council Commentary quoted above is, as defendant and the State have noted, an erroneous statement of the prior law. However, in order to show a deprivation of due process by placing the burden of proof on the defendant in a hearing to determine his competency to stand trial, it is necessary that the placing and carrying of such a burden present a problem of constitutional magnitude. Accordingly, we shall review in detail these earlier authorities to determine if their holdings were derived through an adherence to constitutional mandates relative to the defendant's ultimate burden in any competency hearing or merely an outgrowth of a statute lacking an explicit requirement that defendant bear the burden of proof.

In *People* v. *Bender,* 20 Ill. 2d 45, 169 N.E. 2d 328, a case where the defendant requested the competency[1] hearing,

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1. As will be noted, many of the following excerpts have reference to a "sanity" hearing. Prior to 1963 the words "lunacy" or "insanity" were used to describe the condition of a defendant which would prohibit his standing trial, being sentenced, or being executed. In 1963 the Illinois

it is apparent that the decision was in fact based on the due process requirement that the State bear the burden of proof in all competency hearings. The following series of quotations from that case clearly illustrate this point:

> "Several errors are assigned, but in the view which we take of the case, we find it necessary to consider only one of these assignments. Defendant contends that the procedure at the sanity hearing was so erroneous and irregular that he was deprived of due process of law." 20 Ill. 2d 45, 47, 169 N.E. 2d 328, 329.
>
> "The sanity hearing which is thus prescribed is no empty formality, but is designed to preserve the constitutional right of a defendant not to be placed on trial while he is insane. It is, therefore, of great importance that such a hearing should be free from prejudicial error and that the hearing proceed in accordance with proper rules of evidence and that the jury be properly instructed as to the law." 20 Ill. 2d 45, 48, 169 N.E. 2d 328, 330.
>
> "The instructions in the present case correctly state that the issue of insanity was to be resolved by a preponderance of the evidence. However, these instructions informed the jury that the burden of proving defendant's insanity rested upon the defendant. As we have observed, in the trial of a criminal case the burden is upon the State to prove defendant's sanity. We see no reason why the burden of proof should shift to the defendant in a pre-trial sanity hearing. The test of sanity at such a hearing is whether the defendant understands the nature of the charges against him and

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Legislature amended the earlier statute, substituting "incompetency" for the word "insanity," and in 1973 the legislature again made a substitution, changing the terminology to "unfitness." *See People* v. *Davis,* 25 Ill. App. 3d 1007, 1012-13, 324 N.E. 2d 58.

> whether he can cooperate with his counsel and conduct his defense in a rational and reasonable manner. [Citation omitted.] Let us assume that defendant is in fact unable to cooperate with counsel and present his case in a rational manner. It would be a strange rule, indeed, to impose upon him the burden of proving his own incompetence, for the very disability which he would be seeking to prove renders him incapable, either logically or legally, of sustaining the burden of proof." 20 Ill. 2d 45, 53-54, 169 N.E. 2d 328, 332.
>
> "While such a rule [waiver] is normally applicable in cases involving mere error, it will not operate to deprive an accused of his *constitutional right to due process of law.* [Citation omitted.] When the State, the defense, and the court, all proceeded on an entirely erroneous belief that the burden of establishing insanity rested upon the defendant, it was impossible for the defendant to receive a fair and impartial trial according to the law of this State.
>
> The erroneous and prejudicial cross-examination and the erroneous instructions, which resulted in the entire case being tried upon the wrong theory, deprived defendant of due process of law." 20 Ill. 2d 45, 54-55, 169 N.E. 2d 328, 333. (Emphasis added.)

Similar language portraying this question as one of constitutional magnitude is found in *People* v. *McKinstray,* 30 Ill. 2d 611, 198 N.E. 2d 829:

> "Defendant assigns several errors, the first of which is that the trial court erred in not directing the jury at the sanity hearing to find defendant insane or in the alternative in not ordering a new sanity hearing. Admittedly these objections were not made below, but defendant argues that the constitutional mandate that he not be deprived of his liberty except by due process of law requires us to consider them." 30 Ill. 2d 611, 615, 198 N.E. 2d 829, 831.

"'The court may, as a matter of grace, in a case involving deprivation of life or liberty, take notice of errors appearing upon the record which deprived the accused of substantial means of enjoying a fair and impartial trial, although no exceptions were preserved or the question is imperfectly presented.' [Citations omitted.]" 30 Ill. 2d 611, 616, 198 N.E. 2d 829, 832.

"Defendant clearly rebutted the presumption of his sanity and the People offered no evidence, relying on the testimony of the defendant to establish his ability to rationally conduct his defense and cooperate with counsel. To accept defendant's opinion that he is able to cooperate with counsel in his defense, when the purpose of the hearing is to determine that very fact, would make a sham out of the sanity hearing, * * *" 30 Ill. 2d 611, 616-17, 198 N.E. 2d 829, 832.

A case which is perhaps even more direct in its reference to the constitutional problem of placing the burden of proof in a competency hearing on the defendant is *People* v. *Bedford,* 31 Ill. 2d 227, 201 N.E. 2d 420. In that case the only question the Supreme Court of Illinois confronted was precisely the question we are confronted with here — whether it is appropriate to place the burden of proof upon the defendant in a fitness hearing. In holding that such a procedure constitutes reversible error, the court made the following observations:

"In view of these errors we think that the defendant did not receive a fair determination of his sanity. [Citation omitted.] We do not agree with the People's argument that since the defendant acquiesced in the error he should be barred from asserting it as a ground for reversal. What we said in the *Bender* case in response to a similar contention is precisely pertinent here. 'While such a rule is normally applicable in cases involving mere error, *it will not operate to deprive an accused of his constitutional right to due process of law.* [Citation omitted.] When the State, the defense, and the court, all proceeded in an entirely erroneous belief that the burden of establishing insanity rested upon the defendant, it was impossible for the defendant to receive a fair and impartial trial according to the law of this State.'" 31 Ill. 2d 227, 229, 201 N.E. 2d 420, 421. (Emphasis added.)

If the above-quoted authorities are in any way insufficient to crystallize the stance of the Illinois courts on this point, the stance of the Illinois courts on this point, the following language of *People* v. *Thompson,* 36 Ill. 2d 332, 223 N.E. 2d 97, removes all doubt:

"The burden of establishing defendant's incompetence to stand trial does not rest with the defense. Once any evidence indicating incompetency is brought forth by the defense, the burden devolves upon the State to establish by a preponderance of the evidence that defendant is competent to stand trial. He must understand the nature of the charges against him and be able to cooperate with his counsel. [Citation omitted.] The jury may well have believed that the burden of showing incompetency was upon the defendant because the only information which it had concerning the allocation of the burden of proof indicated that such was the law. In view of the fact that the jury may have considered the entire pre-trial sanity hearing upon an erroneous theory, *we hold defendant was deprived of due process of law.* We have previously held that the waiver rule will not operate, at least where the error is of the substantial magnitude manifested here, to deprive a defendant of his constitutional right to due process." 36 Ill. 2d 332, 334-35, 223 N.E. 2d 97, 98. (Emphasis added.)

We believe that the above-quoted authorities establish beyond doubt that due process will not abide the placing of the burden of proof on a criminal defendant in a hear-

ing to determine his competency to stand trial. The profound impact of these decisions cannot be attributed to the mere absence of a statute clearly allocating such a burden of proof. If such were the explanation, it would have been unnecessary to couch the language in constitutional terms. More important, however, these cases demonstrate that the Illinois Supreme Court recognized at an early date the unfairness of requiring a defendant to prove his own incompetence, "for the very disability which he would be seeking to prove renders him incapable, either logically or legally, of sustaining the burden of proof." *People* v. *Bender,* 20 Ill. 2d 45, 53-54, 169 N.E. 2d 328, 332. Following the wisdom of our own Supreme Court and paying heed to basic principles of fundamental fairness and common sense, we hold it inherently unconstitutional to place the burden of proof on the defendant in a hearing to determine his fitness to stand trial. To the extent that section 1005-2-1 fails to comport with this constitutional prohibition it is null and void.

Having determined that defendant is entitled to a new competency hearing and possibly to a new trial, we must consider other issues raised in this appeal which may reoccur in the course of a new trial.

[3] Defendant has argued that he was denied a fair trial when the court ruled that his mother and sister could not be allowed to testify concerning statements that he made between January 1 and February 6, 1970, the date of the murder. More particularly, the court ruled that the two witnesses could only testify concerning their own observations of defendant, since any statements which defendant may have made would constitute inadmissible hearsay. The defendant's entire defense concerned his insanity at the time of the crime and the theory pre-

sented by the defense was that defendant demonstrated marked irrational behavior from January 1 through February 6, 1970. The *in camera* testimony of these two witnesses, taken as an offer of proof, clearly shows that the court's ruling on this matter was erroneous. One of the statements that the defense sought to have admitted was defendant's remark that he had only six months to live. Clearly, such out-of-court statements would not be hearsay. Hearsay is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of the matter asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter. (McCormick, Evidence, 2d ed., ch. 24, sec. 246, p. 584.) Neither defendant nor the State was trying to prove that anyone was or was not trying to kill the defendant or that the defendant did or did not have six months to live. Such statements were not hearsay and were relevant to the issue of defendant's mental state on February 6, 1970. Considering the importance of such statements as these to a defense based entirely on the defendant's insanity, the court's ruling was extremely prejudicial.

[4] Defendant also contends that he was denied a fair trial when the court allowed a gruesome, color photograph of the deceased's massive head wound to go to the jury. It has been established through a long line of cases in this State that the admission into evidence of a photograph of a murder victim is within the discretion of the trial court, and when the photograph is relevant to establish some material fact it is admissible despite its gruesome nature. (*People* v. *Jenko,* 410 Ill. 478, 102 N.E. 2d 783; *People* v. *Lefler,* 38 Ill. 2d 216, 230 N.E. 2d 827; *People* v. *Speck,* 41 Ill. 2d 177, 242 N.E. 2d 208; *People*

v. *Henenberg,* 55 Ill. 2d 5, 302 N.E. 2d 27; *People* v. *Williams,* 60 Ill. 2d 1, 322 N.E. 2d 819.) In this case, however, the photograph which was admitted could serve no purpose other than to inflame and prejudice the jury in the grossest manner. In view of the defendant's admission of this offense and his defense of insanity, this photograph was not probative of any material issue in the case. There was no reason to graphically supplement the medical testimony regarding the nature and extent of the head wound (*People* v. *Smith,* 5 Ill. App. 3d 648, 283 N.E. 2d 727; *People* v. *Johnson,* 28 Ill. App. 3d 139, 327 N.E. 2d 535), for the testimony was wholly understandable. Nor was there any issue of the cause of death or the identity of the victim which would warrant the introduction of the gruesome photograph. (*People* v. *Henenberg,* 55 Ill. 2d 5, 302 N.E. 2d 27.) In short, the use of the photograph was needlessly prejudicial.

For the foregoing reasons, the judgment of the circuit court of White County is reversed and this cause is remanded for proceedings consistent with this opinion.

Reversed and remanded.

KARNS, P. J., concurs.

JONES, Justice, dissenting.

With principal reliance upon the Supreme Court case of *Leland* v. *State of Oregon* (1952), 343 U.S. 790, 72 S. Ct. 1002, 96 L. Ed. 1302, I respectfully dissent.

"The defendant has been deprived of due process," the majority says, while holding unconstitutional that statute which places upon defendant the burden of proving his incompetence to stand trial when it is he who raises the question of his competency. Ill. Rev. Stat. 1975, ch. 38, par. 1005-2-1(i) and (j).

The constitutionality of the statute was neither litigated during the trial nor questioned in defendant's post-trial motion. Accordingly, the matter has been waived and defendant should have been, but was not, precluded from raising the question in this appeal. *People* v. *Howell* (1975), 60 Ill. 2d 117, 324 N.E. 2d 403; *People* v. *Curry* (1973), 56 Ill. 2d 162, 306 N.E. 2d 292; *People* v. *Pickett* (1973), 54 Ill. 2d 280, 296 N.E. 2d 856.

A competency hearing is a preliminary civil proceeding in which the accused's competency is to be determined by a preponderance of the evidence. (*People* v. *Rosochacki* (1969), 41 Ill. 2d 483, 244 N.E. 2d 136; *People* v. *Bender* (1960), 20 Ill. 2d 45, 169 N.E. 2d 328; *People* v. *Reeves* (1952), 412 Ill. 555, 107 N.E. 2d 861; *People* v. *Cornelius* (1946), 392 Ill. 599, 65 N.E. 2d 439.) The significance of the fact that a proceeding to determine competency is civil in nature is amplified by the fact that in an appropriate case the court may direct a jury verdict of competency. (*People* v. *Rosochacki*; *People* v. *Woods* (1963), 26 Ill. 2d 557, 188 N.E. 2d 1, cert. denied, 373 U.S. 945, 83 S. Ct. 1555, 10 L. Ed. 2d 699.) In the *Rosochacki* case the Supreme Court affirmed the direction of a verdict of competency by applying the rule of *Pedrick* v. *Peoria & E. R. Co.* (1967), 37 Ill. 2d 494, 229 N.E. 2d 504.

What is due process of law depends on the circumstances. It varies with the subject matter and the necessities of the situation. By due process of law is meant one which, following the forms of law, is appropriate to the case, and just to the parties affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and whenever necessary to the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought.

Any legal proceeding enforced by public authority, whether sanctioned by age or custom or newly devised in the discretion of the legislative power, which regards and preserves these principles of liberty and justice, must be held to be due process of law. *Hagar* v. *Reclamation Dist.* (1884), 111 U.S. 701, 704, 4 S. Ct. 663, 28 L. Ed. 569.

"The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.' *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. [123] at 171-172, 71 S. Ct. [624], at 649 [95 L. Ed. 817]. (Frankfurter, J., concurring.) All that is necessary is that the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' *Goldberg* v. *Kelly, supra*, 397 U.S. [254], at 268-269, 90 S. Ct. [1011], at 1021 [25 L. Ed. 2d 287] (footnote omitted), to insure that they are given a meaningful opportunity to present their case." *Mathews* v. *Eldridge* (1976), 424 U.S. 319, 96 S. Ct. 893, 909, 47 L. Ed. 2d 18.

The due process clause of the fourteenth amendment of the U.S. Constitution does not control mere forms of procedure in state courts or regulate practice therein. *Holmes* v. *Conway* (1916), 241 U.S. 624, 36 S. Ct. 681, 60 L. Ed. 1211; *Louisville & N. R. Co.* v. *Schmidt* (1900), 177 U.S. 230, 20 S. Ct. 620, 44 L. Ed. 747.

The establishment of presumptions and rules respecting the burden of proof is clearly within the domain of state governments. *James-Dickinson Farm Mortg. Co.* v. *Harry* (1927), 273 U.S. 119, 47 S. Ct. 308, 71 L. Ed. 569; *Hawkins* v. *Bleakly* (1917), 243 U.S. 210, 37 S. Ct. 255, 61 L. Ed. 678.

In *Simon* v. *Craft* (1901), 182 U.S. 427, 21 S. Ct. 836, 45 L. Ed. 1165, it was stated that the due process clause of the fourteenth amendment does not necessitate that the proceedings in the State court be by a particular mode but only that there be a regular course of proceeding in which notice is given of the claim asserted and opportunity is afforded to defend against it.

In *Leland* v. *Oregon*, the foregoing principles were applied in a factual setting similar to that posed in the case under consideration. Although the statute in question dealt with insanity as a defense to a crime rather than with competency to stand trial, the governing due process principles are without question the same. I consider the Supreme Court's disposition in *Leland* to be conclusive authority for the validity of the statute which the majority has voided.

In *Leland* defendant was charged with first degree murder. He entered a plea of not guilty and gave notice of his intention to prove insanity. Oregon statutes required appellant to prove his insanity beyond a reasonable doubt and made "a morbid propensity" no defense. The principal question as stated by the Supreme Court was whether the statute deprived defendant of life and liberty without due process of law as guaranteed by the fourteenth amendment.

The jury was told in instructions that the burden of proof of defendant's guilt was upon the State and that this burden did not shift, but rested upon the State throughout the trial, just as, according to the instructions, appellant was presumed to be innocent until the jury was convinced beyond a reasonable doubt that he was guilty. The jurors were to consider separately the issue of legal sanity *per se* — an issue set apart from the crime charged, to be intro-

duced by a special plea and decided by a special verdict. On this issue appellant had the burden of proof under the statute in question.

The Supreme Court stated:

> "Today, Oregon is the only state that requires the accused, on a plea of insanity, to establish that defense beyond a reasonable doubt. Some twenty states, however, place the burden on the accused to establish his insanity by a preponderance of the evidence or some similar measure of persuasion. While there is an evident distinction between these two rules as to the quantum of proof required, we see no practical difference of such magnitude as to be significant in determining the constitutional question we face here. Oregon merely requires a heavier burden of proof. In each instance, in order to establish insanity as a complete defense to the charges preferred, the accused must prove that insanity. The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Snyder* v. *Massachusetts,* 1934, 291 U.S. 97, 105, 54 S. Ct. 330, 332, 78 L. Ed. 674.
>
> Nor is this a case in which it is sought to enforce against the states a right which we have held to be secured to defendants in federal courts by the Bill of Rights. In *Davis* v. *United States,* supra [160 U.S. 469, 16 S. Ct. 353, 40 L. Ed. 499], we adopted a rule of procedure for the federal courts which is contrary to that of Oregon. But '[i]ts procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar.' *Snyder* v. *Massachusetts,* supra, [291 U.S.] at page 105, 54 S. Ct. at page 332, 78 L. Ed. 674. 'The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. * * * An important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review.' Mr. Justice FRANKFURTER, concurring in *Malinski* v. *New York,* 1945, 324 U.S. 401, 417, 65 S. Ct. 781, 789, 89 L. Ed. 1029. *We are therefore reluctant to interfere with Oregon's determination of its policy with respect to the burden of proof on the issue of sanity since we cannot say that policy violates generally accepted concepts of basic standards of justice.*" (Emphasis supplied.) *Leland* v. *State of Oregon,* 343 U.S. 790, 798, 72 S. Ct. 1002, 1007, 1008.

A footnote to the opinion in *Leland* v. *State of Oregon,* 342 U.S. 790, 798, 72 S. Ct. 1002, 1007, noted the following:

> "Twenty-two states, including Oregon, are mentioned as holding that the accused has the burden of proving insanity, at least by a preponderance of the evidence, in 9 Wigmore, Evidence (3d ed. 1940 and Supp. 1951), sec. 2501."

The most definitive discussion of due process in the Illinois cases is found in *The People* v. *Niesman* (1934), 356 Ill. 322, 325, 190 N.E. 668, 669, where it was stated:

> "Due process of law implies the administration of equal laws according to established rules, not violative of the fundamental principles of private right, by a competent tribunal having jurisdiction of the case and proceeding upon notice and hearing. (McGehee on Due Process of Law, p. 1.) The guaranty of due process of law requires that every man shall have the protection of his day in court and the benefit of the general law — a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon in-

quiry, and rends judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. (*Truax* v. *Corrigan,* 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254; *Simon* v. *Craft,* 182 U.S. 427, 21 S. Ct. 836, 45 L. Ed. 1165; *Hurtado* v. *California,* 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 232; *Ex parte Wall,* 107 U.S. 265, 2 S. Ct. 569, 27 L. Ed. 552). An orderly proceeding in which a person is served with notice, actual or constructive, and has an opportunity to be heard and to protect and enforce his rights before a court having power to hear and determine the cause, is due process of law. (*City of Chicago* v. *Cohn,* 326 Ill. 372, 158 N.E. 118; *People* v. *Cohen,* 219 Ill. 200, 76 N.E. 388). The essential elements of due process of law are notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case. *Simon* v. *Craft,* 182 U.S. 427, 21 S. Ct. 836, 45 L. Ed. 1165; *Lent* v. *Tillson,* 140 U.S. 316, 11 S. Ct. 825, 35 L. Ed. 419; *Turpin* v. *Lemon,* 187 U.S. 51, 23 S. Ct. 20, 47 L. Ed. 70; *City of Chicago* v. *Cohn,* 326 Ill. 372, 158 N.E. 118."

The same attributes of due process are also noted in *Griffin* v. *Cook County* (1938), 369 Ill. 380, 16 N.E. 2d 906; and *People ex rel. Nelson, Auditor* v. *Depositors State Bank* (1941), 377 Ill. 602, 37 N.E. 2d 326.

Without question the case of *People* v. *Bender,* relied upon by the majority, stands for the proposition that it was a deprivation of due process when the court conducting his sanity[1] hearing instructed the jury and permitted argument that the burden of proving insanity was upon

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1. In 1963 the legislature amended the applicable statute to substitute "incompetency" for the earlier descriptive word "insanity," and in 1973 the terminology was again changed to "unfitness."

the defendant. However, the reason for that holding, in perfect accord with *Leland* v. *Oregon* and *The People* v. *Niesman,* was that Bender was treated differently procedurally than others with which the court found him to be similarly situated. Under the statute governing the "sanity" of an accused to stand trial (Ill. Rev. Stat. 1953, ch. 38, sec. 593) it had been long ago determined and consistently held that the burden to prove defendant's sanity was on the State. (*E.g., People* v. *Cornelius.*) And, as stated by the court in *Bender:* "As we have observed, in the trial of a criminal case the burden is upon the State to prove defendant's sanity. We see no reason why the burden of proof should shift to the defendant in a pretrial sanity hearing.

The essence of due process is the avoidance of arbitrariness in the application of law. Any criminal defendant, guilty or innocent, is entitled to a fair, orderly, and impartial trial in accordance with the law of the land. (*People* v. *Black* (1937), 367 Ill. 209, 10 N.E. 2d 801; *People* v. *Wagoner* (1956), 8 Ill. 2d 188, 133 N.E. 2d 24.) It was the trial court's failure to conduct defendant's trial "in accordance with the law of the land" that led the court in *Bender* to find a violation of due process.

The other cases cited by the majority, *McKinstray, Bedford, Thompson* and *Yonder,* stand for the same proposition as *People* v. *Bender* and arose in the same factual manner, that is, in each instance the burden of proof of sanity to stand trial was placed on defendants, thereby subjecting them to treatment not accorded others under the governing statute.

Neither *Bender* nor any of the cases following it discuss the propriety of the legislature regulating the procedure and burden of proof in a sanity (competency) hear-

ing within the purview of the due process clause. Under the authorities I have cited above I would find that the legislature plainly does have such power and that the statute in question here does comport with due process.

In view of the footnote to *Leland* v. *Oregon,* which notes that twenty-two states have statutes which cast the burden of proof of insanity upon a defendant, I find it unnecessary to discuss further authorities. I would mention, however, that other States have cast the burden of proof of competency to stand trial upon the defendant. Colorado (*Gomez* v. *Dist. Court in and for the County of Adams* (1972), 179 Colo. 299, 500 P. 2d 134); Louisiana (*State* v. *Bastida* (1975), 310 So. 2d 629); New Mexico (*State* v. *Armstrong* (1971), 82 N.M. 358, 482 P. 2d 61); and Pennsylvania (*Commonwealth* v. *Davis* (1975), 459 Pa. 575, 330 A. 2d 847)

I also disagree with the majority in their conclusion that the admission of the gruesome photograph would constitute reversible error. It is well established that the admission into evidence of a photograph of a murder victim is within the sound discretion of the trial court, and when the photograph is relevant to establish any fact in issue, it is admissible despite its gruesome nature. *People* v. *Speck* (1968), 41 Ill. 2d 177, 242 N.E. 2d 208; *People* v. *Williams* (1975), 60 Ill. 2d 1, 322 N.E. 2d 819.

In the instant case, Dr. Abelson testified regarding the nature and extent of the head wound, and the photograph could have been admitted to aid the jury in understanding his medical testimony. (*People* v. *Smith* (1972), 5 Ill. App. 3d 648, 283 N.E. 2d 727; *People* v. *Johnson* (1975), 28 Ill. App. 3d 139, 327 N.E. 2d 535.) The mere fact that

there was oral testimony describing the wound did not make the photograph unnecessarily cumulative. *People* v. *Henenberg* (1973), 55 Ill. 2d 5, 302 N.E. 2d 27.

More importantly, however, the photograph was relevant in negating, at least partly, the defense of insanity. After defendant fired the shot into the Lamp home, he fled to the jail in McLeansboro, where he announced that he "had just blew his old lady's head off." The photograph depicted the condition of Rosalinda Garlick, which defendant very likely saw before he fled. In that respect, the photograph coupled with the flight would tend to show that defendant did have sufficient capacity to appreciate the criminality of his conduct. The court did not abuse its discretion in admitting the photograph.

APPENDIX B

49447 ISAA-Mt. Vernon

STATE OF ILLINOIS
Office of
CLERK OF THE SUPREME COURT
Springfield
62706

May 26, 1977

Illinois State's Attorneys Assn.
Statewide Appellate Assistance Serv.
Fifth Judicial District
612 Main Street
Mt. Vernon, Illinois 62864

No. 49447 – People State of Illinois, petitioner, vs. Ernest Garlick, respondent. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,
/s/ CLELL L. WOODS,
Clerk of the Supreme Court.

APPENDIX C

ILLINOIS REVISED STATUTES

Chapter 38

1005-2-1. § 5-2-1. Fitness for Trial or Sentencing.) (a) For the purposes of this Section a defendant is unfit to stand trial or be sentenced if, because of a mental or physical condition, he is unable:

(1) to understand the nature and purpose of the proceedings against him; or

(2) to assist in his defense.

(b) The question of the defendant's fitness may be raised before trial or during trial. The question of the defendant's fitness to be sentenced may be raised after judgment but before sentence. In either case the question of fitness may be raised by the State, the defendant or the court.

(c) When a bona fide doubt of the defendant's fitness to stand trial or be sentenced is raised, the court shall order that a determination of that question be made before further proceedings.

(d) When the question of the defendant's fitness to stand trial is raised prior to the commencement of trial, the question shall be determined by the court, or by a jury. The defendant or the State may request a jury or the judge may on his own motion order a jury. When the question is raised after commencement of the trial, the question shall be determined by the court.

(e) Subject to the rules of evidence, matters admissible on the question of the defendant's fitness to stand trial or be sentenced may include, but shall not be limited to, the following items:

(1) the defendant's social behavior or abilities; orientation as to time and place; recognition and correlation of persons, places and things; performance of motor processes; and behavioral functions, habits, and practices;

(2) the defendant's knowledge and understanding of the nature of the charge; of the nature of the proceedings; of the consequences of a finding, judgment or sentence; of the courtroom facilities and personnel; and of the functions of the participants in the trial process;

(3) the defendant's abilities before and during trial to observe, recollect, consider, correlate and narrate occurrences, especially those concerning his own past and those concerning the incidents alleged; to communicate with counsel; and to reason and make judgments concerning questions and suggestions of counsel before trial and in the trial process.

(f) Any party may introduce evidence as to the defendant's fitness.

(g) If requested by the State or defendant, the court shall appoint a qualified expert or experts to examine the defendant and testify regarding his fitness. The court shall enter an order on the county board to pay the expert or experts.

(h) No statement by the defendant in any examination regarding his fitness, shall be admissible on the question of guilt.

(i) The burden of proving the defendant is not fit is on the defendant if he raises the question and on the State if the State or the court raises the question.

(j) The party raising the question has the burden of going forward with the evidence. If the court raises the question, the State shall have the burden of going forward with the evidence. At a fitness hearing held at the instance of the court, the court may call and examine witnesses on the question of fitness. Ill. Rev. Stat. 1975, ch. 38, § 1005-2-1, vol. 1, pp. 2050-1.

APPENDIX D

FIVE ILLINOIS DECISIONS

362 N.E. 2d 307

THE PEOPLE OF THE STATE OF ILLINOIS,

APPELLANT,

vs.

HELEN McCULLUM, APPELLEE.

No. 48207.

Supreme Court of Illinois.

April 5, 1977.

Defendant was convicted in the Circuit Court, Will County, Thomas W. Vinson, J., of unlawful possession of heroin, and she appealed. The Third District Appellate Court, 33 Ill. App. 3d 451, 338 N.E. 2d 248, reversed, and State was granted leave to appeal. The Supreme Court, Thomas J. Moran, J., held that section of the Unified Code of Corrections placing burden of proving fitness upon defendant was applicable; but that section was unconstitutional to extent it placed burden on defendant; that search warrant which was sufficient on its face to support finding of probable cause would not be invalidated because of the conversation between the court and the affiant at the time the warrant was issued; and that defendant did not have standing to raise unconstitutionality of section of the Dangerous Drug Abuse Act.

Affirmed and remanded, wth directions.

1. Criminal Law – 625

Under saving provisions of Unified Code of Corrections, providing that "prosecution" for violation of law occurring prior to effective date of Act would not be affected or abated by Act, a fitness to stand trial hearing was not a part of the "prosecution." S.H.A. ch. 38, §§ 2-16, 1005-2-1(i), 1008-2-1, 1008-2-4.

See publication Words and Phrases for other judicial constructions and definitions.

2. Courts – 100(1)

There can be no "accrued right" in any court decision.

3. Criminal Law – 625

Any rights relating to procedural aspects of a defendant's fitness to stand trial hearing originate only after the defendant becomes entitled to such a hearing.

4. Criminal Law – 625

A defendant is not entitled to a fitness hearing until the trial court has notice of facts raising a bona fide doubt as to the defendant's fitness to stand trial.

5. Criminal Law – 625

Where facts giving rise to defendant's fitness hearing were not presented until February, 1973, no rights in the procedural aspects of the hearing could have accrued to defendant prior to the effective date of the Unified Code of Corrections and, consequently, the saving provisions of the Code required that defendant's fitness hearing be governed by the Code which placed burden of proving unfitness to stand trial on defendant where defendant had raised the issue. S.H.A. ch. 38, §§ 1005-2-1, 1005-2-1(i), 1008-2-4, ch. 56½, § 1402(a)(1).

6. Constitutional Law – 266(7)

Though the legislature has the authority to determine the allocation of the burden of producing evidence and the burden of persuasion, it may not allocate these burdens in a manner that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

7. Mental Health – 432

The concept of fitness to stand trial is grounded on the notion that it is fundamental to an adversary system of justice.

8. Constitutional Law – 268.2(2)

Fundamental fairness dictates that, where a defendant has raised a bona fide doubt as to his fitness to stand trial, the state, as a matter of due process, should bear the ultimate burden of proving defendant's fitness to stand trial.

9. Criminal Law – 625

Section of the Unified Code of Corrections was unconstitutional to the extent that it placed on the defendant the ultimate burden of proving his unfitness to stand trial. S.H.A. ch. 38, §§ 1005-2-1, 1005-2-1(i), 1008-2-4; ch. 56½, § 1402(a)(1).

10. Searches and Seizures – 3.4

A warrant, issued pursuant to a verified complaint which is sufficient on its face to support a finding of probable cause, would not be invalidated because of an alleged unrecorded conversation between the court and the affiant at the time the warrant was issued, which conversation purportedly involved the contents of the complaint.

11. Searches and Seizures – 3.8(1)

Absent a showing of prejudice, failure to serve search warrant at time of search is not, alone, grounds to invalidate the search. S.H.A. ch. 38, § 108-6.

12. Searches and Seizures – 3.8(1)

Where search warrant was complete at the time of its issuance and absent a showing of other prejudice, failure of police officers to leave a copy of a warrant with defendant at time of search was not grounds to invalidate the search. S.H.A. ch. 38, § 108-6.

13. Criminal Law – 1028

It is solely within discretion of reviewing court to consider alleged errors not raised or presented at trial, even if such errors affect substantial rights.

14. Criminal Law – 1030(1)

The purpose of the plain error rule is to mitigate the harshness of the strict application of waiver, especially where the evidence is closely balanced.

15. Criminal Law – 1031(1)

In absence of evidence pertinent to circumstances at the time of the search, Appellate Court would not consider, under the plain error rule, the lawfulness of the manner in which the search was conducted.

16. Criminal Law – 1131(4)

When a reviewing court has notice of facts which show that only moot questions or mere abstract propositions are involved, even when such facts are not in the record, the court will dismiss the appeal.

17. Constitutional Law – 42.1(1)

Where defendant had successfully completed a methadone treatment program and was no longer a heroin addict, she lacked standing to challenge constitutionality of the Dangerous Drug Abuse Act which allegedly unreasonably excluded from treatment individuals who might be addicts, but who were charged and convicted of possession of a controlled substance pursuant to section of the Illinois Controlled Substance Act. S.H.A. ch. 38, § 108-6, ch. 56½, § 1402(a), ch. 91½, § 120.8.

Allan A. Ackerman, of Ackerman, Durkin & Egan, Chicago, for appellant.

Martin Rudman, State's Atty., Joliet (Bart Markese, Asst. State's Atty., of counsel), for the People.

THOMAS J. MORAN, Justice:

The circuit court of Will County found defendant guilty of unlawful possession of over 30 grams of heroin (Ill. Rev. Stat. 1971, ch. 56½, par. 1402(a)(1)). She was sentenced to a term of three to six years in the women's reformatory. The Third District Appellate Court reversed defendant's conviction (33 Ill. App. 3d 451, 338 N.E. 2d 248), and this court granted leave to appeal.

Defendant was arrested on August 3, 1972, when, pursuant to warrant, her home was searched and a quantity of heroin seized. She was later indicted for possession with intent to deliver. Prior to trial, defendant moved to quash the warrant and suppress the evidence seized, and petitioned the court that, in lieu of prosecution, she be treated as a narcotic addict. The court denied defendant's motion and her petition. During the course of trial, which commenced February 20, 1973, defendant's attorney requested that the court conduct a hearing to determine defendant's fitness to proceed inasmuch as she was falling asleep in court and therefore was unable to assist in

the defense of her case. Trial was halted and a prehearing conference held. At the conference, the trial court ruled that the burden of proving fitness to stand trial was governed by section 5-2-1 of the Unified Code of Corrections, which became effective January 1, 1973. This section placed on the defendant the ultimate burden of proving unfitness to stand trial when, as here, the defendant has raised that issue. (Ill. Rev. Stat. 1973, ch. 38, par. 1005-2-1(i). A jury was empanelled and a fitness hearing held. Evidence indicated that defendant was receiving methadone treatments for heroin addiction, and that such treatments were affecting her physical and mental state. The jury, instructed that the burden was upon defendant to prove herself unfit, found defendant fit, and trial on the criminal charge was resumed. The defendant was subsequently found not guilty of possession with intent to deliver, but guilty of the lesser included offense of possessing over 30 grams of heroin.

The appellate court reversed defendant's conviction, holding that the saving provision of section 8-2-4 of the Unified Code of Corrections (Ill. Rev. Stat. 1973, ch. 38, par. 1008-2-4) made section 5-2-1(i) inapplicable to defendant's fitness hearing. It found that prior to the enactment of section 5-2-1(i) the State, rather than the defendant, had the ultimate burden of proving fitness to stand trial, regardless of which party raised the issue. On that basis, it ruled that the trial court had committed reversible error by instructing the jury to the contrary.

The State argues that the trial court's ruling was correct in that the fitness hearing was commenced after the effective date of the Code, and, because the burden of proof is a procedural matter, the defendant was not entitled to have the former burden of proof standards applied.

Defendant counters that she acquired an accrued right to be governed by the prior law, and that such right could not have been divested by the enactment of the Code. She also asserts that if section 5-2-1(i) is applicable, it is unconstitutional in that it is a denial of due process to place upon her the burden of proving her own unfitness to stand trial. By way of cross-appeal, the defendant raises three alleged errors with respect to the issuance and execution of the search warrant, and also challenges the validity of the Dangerous Drug Abuse Act as it applies to her.

[1] Discussion of the Code's applicability to cases pending on its effective date must begin with an analysis of certain of the Code's saving provisions. (Ill. Rev. Stat. 1973, ch. 38, pars. 1008-2-1 and 1008-2-4.) Section 8-2-1 provides:

> "The repeal of Acts or parts of Acts enumerated in Section 8-5-1 [which includes proceedings to determine competency] does not: (1) affect any * * * prosecution pending * * * or rights * * * accrued under any law in effect immediately prior to the effective date of this Code * * *."

Similarly, section 8-2-4 provides:

> "Prosecution for any violation of law occurring prior to the effective date of this Act is not affected or abated by this Act."

Prosecution is defined as "all legal proceedings by which a person's liability for an offense is determined." [Ill. Rev. Stat. 1971, ch. 38, par. 2-16; *People* v. *Chupich* (1973), 53 Ill. 2d 572, 583, 295 N.E. 2d 1.) The sole purpose of a fitness hearing, however, is to determine whether the accused is fit to proceed to trial on the issue of guilt or innocence. (*People* v. *Redlich* (1949), 402 Ill. 270, 276, 83 N.E. 2d 736.) It is not a part of the trial on the crimi-

nal charge. (*People* v. *Rosochacki* (1969), 41 Ill. 2d 483, 489-90, 244 N.E. 2d 136; *People* v. *Bender* (1960), 20 Ill. 2d 45, 53, 169 N.E. 2d 328; *People* v. *Cornelius* (1946), 392 Ill. 599, 601, 65 N.E. 2d 439.) Thus, a fitness hearing is not a part of the legal proceedings by which the accused's liability for an offense is determined.

[2-6] Defendant argues that she acquired an "accrued right" to be governed by the burden of proof standards as they existed prior to January 1, 1973. Overlooked is the fact that prior to this date the legislature never addressed the subject. Case law determined the burden of proof standards in fitness hearings, and since there can be no "accrued right" in any court decision defendant's argument must fail. Further, any rights relating to the procedural aspects of her fitness hearing originate only after she became entitled to such a hearing. A defendant is not entitled to a fitness hearing until the trial court has notice of facts raising a *bona fide* doubt as to her fitness to stand trial. (*People* v. *Shrake* (1962, 25 Ill. 2d 141, 143, 182 N.E. 2d 754; *People* v. *Burson* (1957), 11 Ill. 2d 360, 370, 143 N.E. 2d 239.) Since the facts giving rise to defendant's fitness hearing were not presented until February 1973, no rights in the procedural aspects of the hearing could have accrued prior to the Code's effective date. Consequently, the saving provisions of the Code required that defendant's fitness hearing be governed by section 5-2-1(i). We find, therefore, that the appellate court erred in ruling the Code inapplicable.

Defendant argues, however, that it is a denial of due process to impose upon her the burden of proving her own unfitness. Prior to the enactment of section 5-2-1(i), this court consistently held that once evidence indicating unfitness was brought by the defense, the burden devolved

upon the State to establish by a preponderance of the evidence that defendant was fit to stand trial. (*People* v. *Thompson* (1967), 36 Ill. 2d 332, 334-35, 223 N.E. 2d 97; *People* v. *McKinstray* (1964), 30 Ill. 2d 611, 616-17, 198 N.E. 2d 829; *People* v. *Bedford* (1964), 31 Ill. 2d 227, 228-29, 201 N.E. 2d 420; *People* v. *Bender* (1960), 20 Ill. 2d 45, 53-54, 169 N.E. 2d 328.) This court has held that erroneous instructions with regard to the allocation of the burden of proof constituted a denial of due process. (*People* v. *Thompson* (1967), 36 Ill. 2d 332, 334-35, 223 N.E. 2d 97; *People* v. *Bedford* (1964), 31 Ill. 2d 227, 228-29, 201 N.E. 2d 420; *People* v. *Bender* (1960), 20 Ill. 2d 45, 53-54, 169 N.E. 2d 328.)

> "It would be a strange rule, indeed, to impose upon [the defendant] the burden of proving his own incompetence, for the very disability which he would be seeking to prove renders him incapable, either logically or legally, of sustaining the burden of proof." (*People* v. *Bender* (1960), 20 Ill. 2d 45, 53-54, 169 N.E. 2d 328, 332.)

Similarly, in *McKinstray*, the court noted:

> "To accept defendant's opinion that he is able to cooperate with counsel in his defense, when the purpose of the hearing is to determine that very fact, would make a sham out of the sanity hearing * * *." (*People* v. *McKinstray* (1964), 30 Ill. 2d 611, 616-17, 198 N.E. 2d 829, 832.)

The United States Supreme Court has also recognized the inherent legal disability of an accused, alleged to be unfit, when it stated: "[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." (*Pate* v. *Robinson* (1966), 383

U.S. 375, 384, 86 S. Ct. 836, 841, 15 L. Ed. 2d 815, 821.) It is equally erroneous to argue that a defendant who has raised a *bona fide* doubt as to his fitness to stand trial can be presumed to possess the intelligence and understanding necessary to assist his counsel in gathering, coordinating, and presenting facts required to prove his unfitness. Though the legislature has the authority to determine the allocation of the burden of producing evidence and the burden of persuasion, it may not allocate these burdens in a manner that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Speiser* v. *Randall* (1958), 357 U.S. 513, 523, 78 S. Ct. 1332, 1341, 2 L. Ed. 2d 1460, 1471.

[7-9] The concept of fitness to stand trial is grounded on the notion that it is fundamental to an adversary system of justice. (*Drope* v. *Missouri* (1975), 420 U.S. 162, 171-72, 95 S. Ct. 896, 43 L. Ed. 2d 103, 113.) Fundamental fairness dictates that, where a defendant has raised a *bona fide* doubt as to his fitness to stand trial, the State, as a matter of due process, should bear the ultimate burden of proving defendant's fitness to stand trial. (See *United States* v. *DiGilio* (3d Cir. 1976), 538 F. 2d 972, 988.) We find section 5-2-1(i) to be unconstitutional to the extent that it places on the defendant the ultimate burden of proving unfitness to stand trial.

By way of cross-appeal, defendant raises several alleged errors with regard to the issuance and execution of the search warrant. She initially contends that the trial court erred in refusing to suppress the evidence seized pursuant to the search warrant. She asserts that before the warrant was issued, the issuing court asked the com-

plainant-affiant questions which were not recorded and which purportedly involved the contents of the complaint. From this defendant infers that the court considered facts other than those presented in the complaint, and argues, relying on *People* v. *Elias* (1925), 316 Ill. 376, 147 N.E. 472, and *People* v. *Prall* (1924), 314 Ill. 518, 145 N.E. 610, that if all evidence upon which the court acts is not recorded in the complaint, the warrant is invalid.

[10] Initially we note that the substantive holding of *Elias* was expressely departed from in *People* v. *Williams* (1963), 27 Ill. 2d 542, 544, 190 N.E. 2d 303. Though there are statements in both *Prall* and *Elias* directing that testimony upon which the court acts be reduced to writing and incorporated in a formal complaint, these statements do not aid the defendant here. She does not assert that the complaint, on its face, was insufficient to support the issuing court's finding of probable cause, and she has failed to prove that the issuing court relied on facts other than those presented in the complaint. A warrant, issued pursuant to a verified complaint which is sufficient on its face to support a finding of probable cause, will not be invalidated because of a conversation between the court and the affiant at the time the warrant was issued.

[11, 12] Defendant next asserts it was error to refuse to quash the warrant in that the police officers did not comply with the statute, having failed to leave a copy of the warrant with her at the time of the search. (Ill. Rev. Stat. 1971, ch. 38, par. 108-6.) She claims that this statutory requirement is mandatory, and that failure to comply must invalidate the search. In *People* v. *Curry* (1973), 56 Ill. 2d 162, 171, 306 N.E. 2d 292, it was held that, absent a showing of prejudice, failure to serve the warrant at the time of the search is not, alone, grounds to in-

validate the search. Defendant claims prejudice from the fact that the warrant was allegedly incomplete at the time of the search, and avers that this could have been evident had a copy been served contemporaneously with the search. The record, however, clearly indicates the warrant was complete at the time of its issuance. The defendant, therefore, has not shown prejudice.

[13-15] Defendant asks that we consider, under the plain error rule, the lawfulness of the manner in which the search was conducted. It is solely within the discretion of the reviewing court to consider alleged errors not raised or presented at trial, even if such errors affect substantial rights. (*People* v. *McAdrian* (1972), 52 Ill. 2d 250, 255, 287 N.E. 2d 688.) The purpose of the plain error rule is to mitigate the harshness of the strict application of waiver, especially where the evidence is closely balanced. (*People* v. *Howell* (1975), 60 Ill. 2d 117, 120, 121, 324 N.E. 2d 403.) But a party's failure to urge a particular theory before the trial court will often, as in this case, cause the opposing party to refrain from presenting evidence on such theory, which evidence could have a positive bearing on the disposition of the case. (*People* v. *McAdrian* (1972), 52 Ill. 2d 250, 254, 287 N.E. 2d 688.) Because of the lack of evidence pertinent to the circumstances at the time of the search, the issue does not merit consideration under the plain error rule.

[16, 17] Defendant's final contention is that the trial court improperly denied her petition to be treated as a drug addict pursuant to section 8 of the Dangerous Drug Abuse Act (Ill. Rev. Stat. 1971, ch. 91½, par. 120.8). Defendant argues that section 8 is unconstitutional in that it unreasonably excludes from treatment individuals who may be addicts, but who are charged and convicted of posses-

sion of a controlled substance pursuant to section 402(a) of the Illinois Controlled Substance Act (Ill. Rev. Stat. 1971, ch. 56½, par. 1402(a)). We need not, however, address ourselves to the merits of this constitutional issue because, based on an admission in the defendant's appellate brief, the appellate court found that defendant had successfully completed a methadone treatment program and was no longer an addict (33 Ill. App. 3d 451, 460, 338 N.E. 2d 248). We further note that neither at oral argument, nor in her present brief, has the defendant challenged the appellate court's finding. When a reviewing court has notice of facts which show that only moot questions or mere abstract propositions are involved, even when such facts are not in the record, the court will dismiss the appeal. (*La Salle National Bank* v. *City of Chicago* (1954), 3 Ill. 2d 375, 121 N.E. 2d 486.) Since defendant is no longer an addict, she lacks standing to challenge the constitutionality of the statute.

For the reasons set forth herein, the judgment of the appellate court reversing the judgment of the circuit court is affirmed. The cause is remanded to the circuit court for a new trial to be conducted in accordance with the views expressed herein.

Affirmed and remanded, with directions.